UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Chippewa and Flambeau Improvement Company Docket No. DI04-3-001

ORDER DENYING REHEARING

(Issued July 25, 2005)

1. Chippewa and Flambeau Improvement Company (Company) seeks rehearing of the Commission staff's order of March 30, 2005, which denied the Company's petition for a declaratory order disclaiming jurisdiction over the Turtle-Flambeau Storage Reservoir under a modified plan for reservoir operation.[1] The reservoir is located on the North Fork Flambeau River near Mercer in Iron County, Wisconsin. For the reasons discussed below, we find that, under the modified operating plan, the reservoir continues to provide substantial benefits to downstream generation and must therefore be licensed as part of a complete unit of development. Accordingly, we deny the Company's request for rehearing.

Background

2. This is the sixth in a series of orders concerning the jurisdictional status of the Turtle-Flambeau Storage Reservoir, constructed by the Company in 1926 for, among other things, the purpose of developing hydroelectric power.[2] The reservoir has a

[1] *Chippewa and Flambeau Improvement Company*, 110 FERC ¶ 62,355 (2005).

[2] *See* FPC Fifth Annual Report 85 (1925).

drainage area of about 660 square miles and a surface area of about 17,800 acres,[3] with a maximum usable storage capacity of 101,700 acre feet. The Company operates the reservoir pursuant to a 1990 memorandum of agreement with the Wisconsin Department of Natural Resources.[4] Under that agreement, the reservoir is drawn down seasonally to provide uniform flows in the Flambeau River downstream. The reservoir has a normal maximum surface elevation of 1572.0 ft mean-sea-level (msl). The agreement permits the Company to draw down the reservoir by up to eight feet (to 1564.0 ft msl) during November 20 through June 1, and by up to four feet (to 1568.0 ft msl) during June 1 to November 19. It also requires the Company to release a minimum flow of 300 cubic feet per second (cfs), although the Company states that it frequently releases more than this amount.[5]

3. The Company is a partnership of the owners of eight downstream hydroelectric projects, six of which we relicensed in 1997.[6] The jurisdictional issue arose in

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[3] In its request for rehearing, the Company describes the reservoir as having a surface area of 13,800 acres. Request for rehearing at 5 (filed April 29, 2005). In its petition, however, the company describes the reservoir as having a surface area of 17,800 acres. Petition for declaratory order at 3 (filed November 17, 2003). The company does not address or otherwise explain the discrepancy, so it is possible that it is simply an error. We previously found that the surface area of the reservoir is 17,800 acres. *Chippewa and Flambeau Improvement Company*, 95 FERC ¶ 61,327 at 62,161 (2001). In any event, as we explained in that decision, the discrepancy is not relevant, because Commission staff did not use surface area as a basis for calculating the reservoir's capacity, but rather used actual capacity figures contained in the Wisconsin state proceeding on rules governing the reservoir's operation. *Id.*

[4] *See* Attachment A to the Company's rehearing request (filed April 29, 2005).

[5] Request for rehearing at 5.

[6] The four downstream projects closest to the reservoir, which we found (together with the Turtle-Flambeau Reservoir) constitute a complete unit of development, are the Upper Project No. 2640, Lower Project No. 2421, Pixley Project No. 2395, and Crowley Project No. 2473. These four projects were once owned by Fraser Papers, Inc., but were transferred to Flambeau Hydro, LLC in 1999. *See* 89 FERC ¶ 61,286 (1999). The other four downstream projects are the Big Falls Project No. 2390, Flambeau Project No. 1960, Ladysmith Project No. 2430, and Thornapple Project No. 2475. The license for the Flambeau Project had a later expiration date, and the project was relicensed in 2004. *See* Dairyland Power Cooperative, 107 FERC ¶ 62,043 (2004). The Ladysmith Project is exempt from licensing.

connection with the relicensing proceedings involving the downstream projects. In a series of orders beginning in 1997, the Commission found that the Turtle-Flambeau Reservoir is required to be licensed because is it necessary or appropriate in the maintenance and operation of a complete unit of development comprised of the four downstream projects closest to the reservoir.[7] The Company sought judicial review. On April 13, 2003, the U.S. Court of Appeals for the District of Columbia Circuit denied the Company's petition, upholding the Commission's jurisdictional determination in all respects.[8]

4. On November 17, 2003, the Company filed a petition for a declaratory order, requesting that the Commission disclaim jurisdiction over the Turtle-Flambeau Reservoir under a modified operating regime. The Company stated that, because of the high cost of preparing a license application, it would prefer to modify operation of the reservoir's headgates so as to cease all regulation of flows in the Flambeau River, thus eliminating any basis for Commission jurisdiction and obviating the need to obtain a license. However, the Company asserted that this would likely force the owner of a pulp and paper mill to curtail or cease operations as a result of its inability to comply with its point-source discharge permit, thus jeopardizing the jobs of the mill's 363 employees.[9] The Company stated that it was therefore proposing a modified operating regime that should allow sufficient flow regulation to allow the mill to continue to operate during summer low-flow periods while reducing energy gains at downstream hydroelectric project by approximately half, to 3.45 percent (as compared with the average 7.25 percent increase in generation that staff had previously calculated was attributable to reservoir operations).[10] The Company proposed to do this by limiting the drawdown of the reservoir to 1.5 feet year-round, coupled with a drought contingency provision to provide

[7] *See Chippewa and Flambeau Improvement Comp*any, 78 FERC ¶ 62,088 (1997) (order finding reservoirs required to be licensed), 85 FERC ¶ 61,234 (1998) (order on rehearing), 95 FERC ¶ 61,017 (2001) (order on remand, issued after the court granted the Commission's motion for a voluntary remand to provide for further procedures and explanation), 95 FERC ¶ 61,327 (2001) (order denying rehearing).

[8] *Chippewa and Flambeau Improvement Company*, 325 F.3d 353 (D.C. Cir. 2003) (*Chippewa*).

[9] At the time, Fraser Papers, Inc. owned the pulp and paper mill. Fraser sold the mill to Smart Papers, Inc. in the first quarter of 2005. *See* request for rehearing at 7 n. 3.

[10] *See* 95 FERC ¶ 61,327 at 61,161.

additional flows when needed during extremely dry summer conditions or droughts.[11] The Company requested that the Commission exercise its "significant discretion" to conclude, based on these circumstances, that the Turtle-Flambeau Reservoir, if operated in this manner, would not be appropriate in the maintenance and operation of the downstream projects and therefore would not require a license.[12]

5. Commission staff reviewed the proposed operating plan and found that the 3.45 percent increase in generation that would occur under the plan at the downstream four-project unit of development was nevertheless still significant, because it was "well above the level at which the Commission asserted its jurisdiction in earlier cases."[13] Staff therefore denied the petition. The Company's request for rehearing followed.

6. On rehearing, the Company argues that the "miniscule" amount of downstream energy gains produced by the Turtle-Flambeau Reservoir under the modified operating regime — gains of 3.45 percent or 0.86 gigawatt hours (GWh), which is sufficient to serve the annual needs of just 84 average households, with a value of $28,000 — does not justify the Commission's asserting jurisdiction over the reservoir and requiring the Company to spend over $750,000 to license it and thereafter comply with the Commission's regulatory requirements.[14] The Company further argues that this

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[11] The Company takes issue with staff's conclusion that the drought contingency provision would result in increased downstream generation, claiming that staff implied the increase would be significant and that this conclusion is baseless. Request for rehearing at 15 and 22 n.15. Because staff did not attempt to quantify this amount, or even to characterize its significance, we fail to see the relevance of the Company's argument.

[12] Petition for declaratory order at 4.

[13] 110 FERC ¶ 62,335 at 64,688.

[14] Request for rehearing at 1. The Company suggests that, because the Commission's new integrated licensing process will become the default process for applications filed after July 23, 2005, the costs will likely be significantly higher. *Id.* at 16-17. However, prospective applicants may request permission to use either the traditional or alternative licensing process. *See* 18 C.F.R. § 5.3(b); *see also* §§ 5.3(c)(1) and (2). Alternatively, the licensee of the four downstream projects comprising the unit of development, Flambeau Hydro LLC, could possibly obtain sufficient rights to operate the Turtle-Flambeau Reservoir and seek to amend the license for one of its projects to include it as a project work (or, after obtaining such a license amendment, could acquire the reservoir using the eminent domain authority available to licensees under section 21 of the FPA).

"miniscule" generation does not justify the "potentially devastating socio-economic impacts to downstream communities and other downstream users that could occur" if the Company should cease all flow regulation in order to remove the basis for the Commission's assertion of jurisdiction.[15] The Company asserts that, consistent with the Commission's duty to protect the public interest and its policy that jurisdictional

determinations must incorporate "common sense limitations" and should not be based on bright-line distinctions, the Commission should decline jurisdiction over the Turtle-Flambeau Reservoir under the modified operating regime.[16]

7. As explained below, we find that the Company has advanced no new legal arguments in support of its position. Moreover, the public interest and policy considerations that it urges us to take into account do not bear on the statutory provisions that must govern our jurisdictional determinations. We therefore deny rehearing.

Discussion

8. Section 4(e) of the Federal Power Act[17] (FPA) authorizes the Commission to issue licenses for hydroelectric project works, including reservoirs. Section 23(b)(1) of the FPA[18] requires (with exceptions not relevant here) a Commission license for the operation of project works, again including reservoirs, for the generation of electric power on any navigable waters of the United States.

9. Section 3(12) of the FPA[19] defines "project works" as "the physical structures of a project." Section 3(11) of the FPA[20] defines "project" as "a complete unit of

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[15] *Id.*

[16] *Id.* at 1-2.

[17] 16 U.S.C. § 797(e).

[18] 16 U.S.C. § 817(1).

[19] 16 U.S.C. § 796(12).

[20] Section 3(11) provides:

> (11) "project" means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected

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improvement or development, consisting of a power house" and, among other things, "all miscellaneous structures used and useful in connection with said unit . . . [and all] reservoirs . . . the use and occupancy of which are necessary or appropriate in the maintenance and operation of said unit."

10. In determining whether licensing is required for a facility such as a storage reservoir that is not directly connected to other project works, the FPA requires an examination of whether the facility is necessary or appropriate in the maintenance and operation of a complete unit of hydropower improvement or development.[21] In making this determination, we consider such relevant factors as the effect of the reservoir on downstream generation and its storage capacity, location, and purpose, balancing these considerations in light of the facts of each case.

11. In reviewing our earlier decisions concerning the Turtle-Flambeau reservoir, the court in *Chippewa* endorsed this approach, finding that we had engaged in "reasoned decisionmaking."[22] The court stated:[23]

> Although some uncertainty is unavoidable when a decision is remitted to agency discretion, we disagree with the Company that the Commission's decisions in this case and others like it leave the owner of a reservoir in the dark about the necessity to obtain a license under the [FPA]. The Commission has reasonably interpreted the [FPA] to require licensure of a reservoir that provides to a licensed power plant downstream benefits substantial enough to be deemed "necessary or appropriate" to the

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> therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water rights, rights-of-way, ditches, dams, reservoirs, lands or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit.

16 U.S.C. § 796(11).

[21] *See Union Water Power Co.*, 68 FERC ¶ 61,180 (1994), *reh'g denied*, 73 FERC ¶ 61,296 (1995).

[22] *Chippewa*, 325 F.3d at 358.

[23] *Id.* at 358-59 (citation omitted).

> operation and maintenance of that plant. And the Commission has found an increase in total generation of 2.4 percent or more "substantial," while considering an impact of 0.6 percent insufficient. In this case the increase was clearly above the line of demarcation, wherever it may lie between 2.4 and 0.6 percent. The remaining uncertainty within that range did not affect the Company.

12. In light of this aspect of the court's decision, we are somewhat puzzled by the Company's argument that staff's use of a 3.4 percent trigger level to find substantial downstream generation benefits is arbitrary and capricious as applied to the facts of this case. The Company simply faults staff's use of the 3.4 percent figure as applied here, without acknowledging the fact that the court endorsed our finding that an increase in total generation of 2.4 percent or more could be considered "substantial."[24] Significantly, the court made that statement in the course of reviewing our decision on the effects of the same Turtle-Flambeau reservoir that is now at issue in this proceeding. In our view, the court's endorsement of our earlier decisions is dispositive. Nevertheless, we will consider the Company's remaining arguments as presented in its rehearing request.

13. The Company argues that forcing the owner of a storage reservoir to cease beneficial flow regulation to avoid the burden of Commission regulation because of a "miniscule" $28,000 gain in downstream generation is an arbitrary and capricious exercise of the Commission's discretion.[25] In support, the Company advances three main arguments, which we consider in turn.

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[24] *Id.* at 359. The court derived the 2.4 percent figure from our finding in *Georgia Pacific Corp.*, 91 FERC ¶ 61,047 (2000), in which we found that storage reservoirs that added from 2.4 to 4.9 percent to the total annual output of downstream generation (with an annual average increase of 3.4 percent) were part of the downstream unit of development. The court subsequently affirmed this determination in *Domtar Maine Corporation v. FERC*, 347 F.3d 304 (D.C. Cir. 2003), *cert. denied*, 541 U.S. 1029 (2004). In doing so, the court noted that the 3.4 percent aggregate average impact of the two facilities in question was "far above the 2-to-2.5 percent threshold." 347 F.3d at 312.

[25] Request for rehearing at 16.

14. The Company first asserts that rote application of a "percentage gains test" can produce absurd results in certain cases, and that this is one of them.[26] In essence, the Company argues that, before considering a storage reservoir's effect on downstream generation, we must first determine that the amount of energy produced by operation of the reservoir is in some sense "significant." The Company does not attempt to indicate how much energy this might be, but simply states that the energy gains of 0.86 GWh attributable to operation of the Turtle-Flambeau Reservoir under the modified plan are "insignificant."[27] The Company suggests that rote application of trigger levels might be appropriate when the downstream projects are large, so that the downstream generation increases are of some significance. However, the Company points out that, when the downstream hydroelectric projects are small, correspondingly small energy gains will meet the percentage trigger levels. This, the Company asserts, results in the assertion of Commission jurisdiction based on "pure chance, without any consideration of the relative magnitude of the actual energy gains involved." [28]

15. We disagree. We rejected a similar argument in one of our *Georgia Pacific* decisions, noting that applying a rigid numerical standard for determining the amount of energy that would be considered significant could lead to inappropriate results.[29] If the standard were set too high, for example, a reservoir that contributed the entire flow to a small project would not be required to be licensed. Simple arithmetic dictates that, if a percentage is applied to a small number, it will yield a smaller absolute amount than if the same percentage is applied to a larger number. Thus, a storage reservoir located upstream of a small project can produce a larger percentage increase in generation than would be the case if the same reservoir were located upstream of a larger project. It is for this reason that we consider the magnitude of the downstream generation increase in relation to the amount of generation that would otherwise occur if the reservoir did not exist. The significance of the increase in generation cannot be assessed in a vacuum, but rather must be considered in relation to the generating capacity of the downstream facility that it benefits. We find nothing arbitrary or capricious in our use of a percentage gains test, and conclude that it is appropriate for both larger and smaller downstream generating projects.

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[26] The Company also reiterates its assertion that in eighty years of operation of its Turtle-Flambeau Reservoir, no one has ever identified a problem necessitating Commission oversight. The court considered and rejected this argument. *Chippewa*, 325 F.3d at 357.

[27] Request for rehearing at 18.

[28] *Id.*.

[29] *Georgia Pacific Corporation*, 98 FERC ¶ 61,312 at 62,336 (2002).

16. Nor do we agree with the Company's assessment that the 3.45 percent energy gains produced by operation of the Turtle-Flambeau Reservoir under the modified operating plan are "miniscule." While it is true that the absolute amount of energy involved is not large, it represents a substantial contribution to downstream generation, as we have found in this and other cases. Moreover, although the four downstream projects at issue are all fairly small (between 900 and 1500 kilowatts), we regulate a number of projects that size or smaller, and there is no *de minimis* exception to our licensing jurisdiction under the FPA.[30] Thus, we find no basis upon which we could disclaim jurisdiction in this case based on the amount of energy involved.

17. The Company next argues that the Commission is required to assess public interest considerations in exercising its discretion, but has not done so. The Company maintains that, in making its jurisdictional determination in this case, the Commission's affirmative duty to protect the public interest requires it to consider the impacts its assertion of jurisdiction will have on the mill, its employees, the town of Park Falls (where the mill is located), surrounding communities, and other downstream dischargers.[31] In support, the Company reiterates the extensive and detailed information it provided in its petition about the negative socioeconomic and environmental effects that it asserts will result if the Commission does not disclaim jurisdiction, and faults staff's decision for failing to consider this information.

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[30] It is well settled that small hydroelectric projects that are interconnected with the electrical grid have a real and substantial effect on interstate commerce and must be licensed if they meet the other jurisdictional requirements of FPA section 23(b)(1). *See Habersham Mills v. FERC*, 976 F.2d 1381 (11th Cir. 1992).

[31] In support, the Company cites *Elkem Metals Co.*, 45 FERC ¶ 61,044 at 61,150 (1988). In that case, the Commission considered socioeconomic effects of increased minimum flows in determining what flows should be required in a new license. The Commission noted that, under FPA section 10(a)(1), it must consider socioeconomic impacts in making its licensing decisions, because it is required under that section to consider all aspects of the public interest. The Commission's jurisdiction was not at issue in that case. The Company also maintains that the Commission must act affirmatively to protect the public interest, and cannot "act as an umpire blandly calling balls and strikes for adversaries appearing before it," citing *Scenic Hudson Preservation Conference v. FPA*, 354F.2d 608, 620 (2d Cir.), *cert. denied*, 384 U.S. 941 (1965). Again, because the Commission must first have jurisdiction before it can act to protect the public interest under section 10(a), this case does not support the Company's position.

18. Under section 10(a) of the FPA, our licensing decisions must protect the public interest.[32] This does not mean, however, that we can assert or decline jurisdiction under the FPA based on public interest considerations. Rather, our jurisdiction is clearly delineated by FPA sections 4(e) and 23(b)(1), as aided by the definitions in sections 3(11) and 3(12) discussed above. Jurisdiction is a threshold determination under the FPA. In other words, we must first find that a project work requires licensing before we may require conditions to protect the public interest in accordance with FPA section 10(a). Nothing in the FPA could be construed as authorizing us to assert or decline jurisdiction based on the effects that may be expected to occur as a result of our decision. Staff therefore properly refused to consider the Company's information concerning those effects, as do we.

19. The Company next argues that the Commission cannot use the benefits that can be required through regulation as a basis for jurisdiction. This is simply the flip side of the Company's earlier argument discussed above, and we have no quarrel with it. The Company maintains, however, that staff found in its order that the "benefits to water quality and other uses that the Commission allegedly could create by regulating [Turtle-Flambeau] justified its assertion of jurisdiction."[33] The Company adds that this "outrageous position is clear legal error."[34] The Company misrepresents staff's decision. We find nothing in the decision that even approximates a statement that the benefits of regulation can be used to justify the Commission's assertion of jurisdiction. We therefore deny rehearing of this issue.[35]

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[32] 16 U.S.C. § 803(a). *See Udall v. FPC*, 387 U.S. 428 (1987).

[33] Request for rehearing at 20.

[34] *Id.*

[35] In response to the Company's complaint that the costs of licensing and compliance would be substantial compared to the benefits of increased generation from regulation of the reservoir, staff observed that the Company "fails to recognize benefits accruing to other water resource users such as recreation, water quality, and fish and wildlife protection associated with reservoir regulation." 110 FERC ¶ 62,335 at 64,688. After concluding that, even with the modified operating regime, the increase in annual generation at the four-project unit of development is "well above the level at which the Commission asserted its jurisdiction in earlier cases," staff observed that "[t]he benefits from reservoir regulation would not be limited only to increased energy generation but would also include benefits to other water resource uses such as water quality, recreation, etc." *Id.* Taken in context, it is clear that these were statements made in response to the Company's arguments, not findings in support of Commission jurisdiction.

20. Finally, the Company argues that the reliability of the computer-generated estimate of downstream energy gains under the modified operating regime is highly questionable. The company maintains that there is a "significant flaw" in that model, because the generation amounts it predicts would occur at the downstream four-project unit with flow regulation "substantially exceeds the actual generation produced at those downstream hydroelectric projects.[36] The company adds that the yearly average actual generation at those four projects is "nearly identical" to the amount computed for those projects without regulation.[37] The Company acknowledges that it used the same model in making its own calculations, and also that it "has not been able to identify the flaw" that produces these results.[38] The Company nevertheless maintains that this flaw "calls into question the accuracy and the reliability of all the model's predictions."[39]

21. We reject this contention. At best, it amounts to nothing more that an observation that the amount of generation calculated for the four-project unit with regulation is larger than the amount of energy actually generated at those four projects, coupled with a second observation that the difference between the calculated amount of generation without regulation is numerically closer to the amount actually generated than the calculated amount of generation with regulation. What the Company fails to recognize, however, is that there is nothing inherently suspect about a project's actual generation being lower than predicted. Any number of factors, such as weather or maintenance outages, could account for this, and the Company makes no mention of them. Moreover, as would be expected, the calculated amount of generation without regulation is lower than both actual generation and the calculated amount of generation with regulation.[40] As noted, the Company makes no attempt to explain what it thinks might be wrong with the

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[36] Request for rehearing at 21-22.

[37] *Id.* at 22.

[38] *Id.*

[39] *Id.*

[40] The company further observes that, if all eight downstream projects are included, the amount of generation that the model predicts would occur without flow regulation exceeds the actual generation amounts that occurred at these projects. Request for rehearing at 22. In an earlier order in this case, we found that the four most upstream projects (the Upper, Lower, Pixley, and Crowley Projects) are physically and operationally interrelated, and that there is no physical or operational connection between these four projects and the remaining four projects farther downstream. 95 FERC ¶ 61,327 at 62,161. The Company challenged our finding on judicial review, and the court upheld it as reasonable. 325 F.3d at 359. Accordingly, there is no logical basis for

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model, but simply claims that the results are suspect. This is the same general methodology that staff has used for many years in this and other cases, and we find no basis in the Company's assertions for rejecting staff's analysis.[41]

The Commission orders:

The request for rehearing filed by the Chippewa and Flambeau Improvement Company in this proceeding on April 29, 2005, is denied.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.

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including all eight downstream projects, and the fact that anomalous results may be produced by doing so is not relevant.

[41] We previously found that staff's method of estimating energy gains attributable to the storage reservoirs was appropriate, and the Company had ample opportunity to challenge staff's analysis. *See* 95 FERC ¶ 61,327 at 62,156.